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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 304

THE LONG ISLAND RAILROAD COMPANY,
Petitioner,

v.

JOHN R. PARKER, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 13, 1970

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v.

JOHN R. PARKER, JR.,
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PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner The Long Island Railroad Company (hereinafter referred to as "the LIRR") respectfully prays that a writ of certiorari issue to review the final judgment and the opinion of the Court of Appeals for the Second Circuit entered on February 18, 1970.

OPINIONS AND ORDERS BELOW

On February 3, 1969, the District Court for the Eastern District of New York entered judgment in the amount of $17,000 in favor of respondent John R. Parker, Jr., and against the LIRR. No opinion was rendered by the District Court.

The opinion of the Court of Appeals for the Second Circuit (Smith, C. J. and Anderson, C. J.) affirming the judgment of the District Court and the dissenting opinion of Judge Henry J. Friendly have not yet been reported. A copy of those opinions is appended hereto at pages 1A and 4A.

A copy of the order of the Court of Appeals for the Second Circuit, dated April 14, 1970, denying the LIRR's timely petition for rehearing (Friendly, C. J. dissenting and voting to grant rehearing), is appended hereto at page 8A.

A copy of the order of the Court of Appeals for the Second Circuit, dated April 14, 1970, denying the LIRR's suggestion that the appeal be reheard in banc is appended hereto at page 9A.

JURISDICTION

The date of the judgment of the Court of Appeals sought to be reviewed is February 18, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 10A.

The date of the order of the Court of Appeals denying the LIRR's petition for rehearing is April 14, 1970. A copy of that order is appended hereto at page 8A.

This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Is the FELA applicable to an injury, allegedly due to defective or insufficient lights on stairs leading to a passenger train platform, which was sustained when a prospective passenger was not performing one of the duties of his employment as a railroad employee, when he was

not on the premises where he performed those duties and when he was not under the supervision or control of his employer?

STATUTORY PROVISION INVOLVED

The statutory provision which the case involves is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended by 53 Stat. 1404 (1939), 45 U. S. C. § 51:

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of

such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

STATEMENT OF THE CASE

A. The Facts

Respondent John R. Parker, Jr., was employed by the LIRR as a track maintenance man. Although his duties as an apprentice foreman took him to different locations along the LIRR's tracks, he reported to work each morning at a building in Hicksville, Long Island known as the Hicksville divide tower. There, he and his work crew were instructed as to which portions of the tracks they were to work on that day and what they were to do there. Mr. Parker and his work crew were then transported by a LIRR

truck to their work site for the day. At the conclusion of each day's work, the men were transported by truck back to the tower where Mr. Parker was required to check at the office to see if there was any emergency work to be done. If there was none, his work day was completed and he was free to do as he pleased until he reported to work again.

Although he was not required as a condition of his employment to use any particular method of transportation between his home and the tower, Mr. Parker customarily traveled by LIRR passenger train between the passenger station nearest his home in Brooklyn and the passenger station in Hicksville. Mr. Parker traversed the approximately 8 city blocks between the tower and the Hicksville passenger station by walking on the public streets known as Broadway and Hicksville Road. There was no evidence in the record to indicate that the LIRR was aware of Mr. Parker's customary method of traveling to and from work. There was evidence indicating that some of his fellow employees made the trip between Brooklyn and the tower by private automobile.

Mr. Parker possessed a pass issued by the LIRR to "John Parker and Twenty-five Employes—Forman Track" which was apparently intended for use when Mr. Parker and members of his work crew had to use a LIRR train to reach the site of an emergency. Mr. Parker testified that he customarily used that pass to travel between his home and the tower without paying a fare. There was no evidence in the record to indicate that the LIRR had authorized Mr. Parker to use or was even aware that he had used the pass for that purpose. Such use was in no way related to his duties as a LIRR employee and Mr. Parker was not paid for time spent traveling between his home and the tower. His hourly wages began when he reported to the tower

in the morning and ended when he reported back to the tower in the evening.

On Friday, July 24, 1964, Mr. Parker completed his track maintenance duties for the day and reported back to the tower at about 4:40 p.m. There was no emergency work to be done. At that point, his duties for the day were completed and he was free to engage in whatever personal activity he desired. Viewing the evidence in the light most favorable to Mr. Parker, he voluntarily spent the next three to three and one-half hours of that Friday afternoon and early evening in the tower doing paper work connected with his job and not partaking of alcoholic beverages. However, he did not seek payment for and, in fact, was not paid for the time after 4:40 p.m. which he allegedly spent working on records. At about 8:30 p.m., Mr. Parker left the tower intending to go home. He walked the 8 blocks to the Hicksville passenger station where he successfully negotiated the first of three flights of stairs leading to the elevated passenger train platform but stumbled on one of the steps in the middle flight and fell. The cause of the fall was alleged to be a lack of light on the stairs. The LIRR did not dispute that at the time of Mr. Parker's fall the electric lights, which were turned on automatically when a photo-electric cell was activated by a lack of natural light, had not yet come on. On the other hand, Mr. Parker did not dispute that those lights did come on a short time after his fall.

B. The Proceedings Below

Mr. Parker commenced this action in the District Court for the Eastern District of New York, invoking its jurisdiction by alleging that the action arose under the provisions of the FELA. He sought damages for personal injuries allegedly attributable to the LIRR's negligence. The case was tried to a jury which returned a special verdict finding that Mr. Parker was in the LIRR's employ at the time of

the accident, that the LIRR had been negligent, that the LIRR's negligence proximately caused injury to Mr. Parker and that Mr. Parker had been contributorily negligent to the extent of 15%. The jury found that Mr. Parker's total damages were $20,000. The District Court denied the LIRR's motions for a directed verdict and for judgment n.o.v. and, on February 3, 1969, entered judgment for Mr. Parker in the amount of $17,000.

The LIRR appealed to the Court of Appeals for the Second Circuit which affirmed, Judge Friendly dissenting. The LIRR then petitioned for rehearing and suggested that a rehearing in banc was appropriate. The court denied the petition with Judge Friendly dissenting and voting to grant a rehearing. No active circuit judge requested that a vote be taken on the LIRR's suggestion in its petition that a rehearing in banc was appropriate and it was accordingly denied.

C. The Second Circuit's Opinion

The majority's opinion acknowledges that the general rule is that the FELA is not applicable to injuries suffered while an employee is traveling to or from work. However, it created a novel exception to that general rule by holding that the FELA is applicable to an injury suffered by an employee while traveling to his home after completing his normal duties for the day (1) if it would not be "economically feasible" for him to remain an employee of the railroad unless he were provided with free transportation between home and work and (2) if the railroad has an interest in his travel from his home to the sites of emergencies when they occur. The majority concluded that the jury in the case at bar could reasonably find such a lack of economic feasibility from the evidence that Mr. Parker

was paid $128 a week and that his home was 40 miles from the tower.

D. The Dissenting Opinion

Judge Friendly was of the view that as a matter of law Mr. Parker was not "employed by" the LIRR at the time of his accident within the meaning of Section 1. The rationale underlying Judge Friendly's conclusion was that the hazards to which Mr. Parker was exposed were the same as those faced by any other commuter who used the stairs leading to the passenger train platform. Since he was at the station in his capacity as a commuter and not as an employee, and since the danger to which he was exposed was neither connected with nor increased by the hazards of the actual duties of his employment, there was no justification for the application of the special benefits granted railroad employees by the FELA to compensate for the hazards of their employment. Judge Friendly rejected the majority's use of the distance between Mr. Parker's home and the tower as a test of the applicability of the FELA. He expressly recognized that the majority's opinion is in direct conflict with the decisions of three other Courts of Appeals and he pointed out that although the FELA was inapplicable, Mr. Parker was not without a remedy because he could have sued, like any other prospective passenger, on a common law negligence theory. Judge Friendly stated:

> ". . . However one may feel with respect to judicial efforts to cause the FELA to afford a degree of protection regardless of fault more nearly equivalent to workmen's compensation statutes, I see no justification for streching it to accord protection where such statutes would not."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THREE OTHER COURTS OF APPEALS AS TO THE SCOPE OF THE APPLICABILITY OF THE FELA AND WHEN AN EMPLOYEE IS "EMPLOYED BY" A RAILROAD WITHIN THE MEANING OF SECTION 1 OF THE FELA.

A. The Direct Conflict Among the Circuits

As Judge Friendly stated in his dissenting opinion, the Court of Appeals for the Second Circuit has rendered a decision on the question of when an employee is "employed by" a railroad within the meaning of Section 1 of the FELA which is in direct conflict with (1) the Third Circuit's decision in *Sassaman* v. *Pennsylvania R. R.*, 144 F. 2d 950 (3d Cir. 1944); (2) the First Circuit's decision in *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1st Cir. 1959); and (3) the Seventh Circuit's opinion in *Quirk* v. *New York, C. & St. L. R. Co.*, 189 F. 2d 97 (7th Cir.), *cert. denied*, 342 U. S. 871 (1951). Each of those cases held that the FELA is not applicable to an injury which occurs when an employee is not performing one of the duties of his employment, when he is not on the premises upon which he performs those duties and when he is not under the supervision or control of his employer.

1. *Sassaman* v. *Pennsylvania R.R.*

In the *Sassaman* case, a train dispatcher left his place of employment in the railroad's terminal offices in Jersey City after completing his work for the day and boarded one of his employer's passenger trains, intending to go to his home in Newark. He traveled on a pass to which he

was entitled because of the length of his service with the railroad. He was injured as he detrained in Newark because of the bad state of repair of the platform. The Third Circuit held that the FELA was inapplicable because he was not performing one of the duties of his employment at the time of the accident, because he was traveling on the passenger train voluntarily and not pursuant to instructions from his employer and because the accident did not occur on the premises where he normally performed the duties of his employment or upon premises so closely adjacent thereto as to be a part of the work premises in the sense that it was necessary to traverse them in order to get to or from his work premises. The court stated:

> " . . . When the plaintiff descended from his place of employment to the defendant's Jersey City station he was free to travel home or go elsewhere, as suited his desires, by whatever means of transportation he chose. He was not required to travel on the defendant's train. Much less, was he required to travel upon a particular train. There was absent, therefore, the employer compulsion as to the mode of travel to and from work which serves to attach or continue the employee relationship, away from the place of employment, and make an interstate employee's right of recovery for injury remediable under the Federal Employers' Liability Act." 144 F. 2d at 953.

2. *Metropolitan Coal Co. v. Johnson*

In the *Metropolitan Coal* case, a railroad flagman boarded one of his employer's passenger trains in Rhode Island intending to go from his home in that state to Boston where he was to join the crew of his freight train prior to

the start of its run to New Haven. He was injured when the passenger train ran over a cable, causing a hook attached to it to shatter the window next to which he was sitting. He was traveling on a pass which the railroad was contractually obligated to issue to him. The First Circuit expressly held that the employee was not "employed by" the railroad, within the meaning of Section 1, at the time that he was injured and stated:

> "... although the plaintiff was on the carrier's premises when he was injured, he was not on a part of its premises which it was necessary for him to use to reach his work. He was not required to go to work on the defendant's passenger train. He could have taken any one of a number of other routes, trains or means of transportation to go from his home to his work .... the obvious purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work, and the plaintiff's employment as a flagman on a freight train did not subject him to any peculiar or abnormal danger while he was riding to work on one of his employer's passenger trains. On that train he was exposed to no other or greater hazard than any other passenger." 265 F. 2d at 178.

3. *Quirk* v. *New York, C. & St. L. R. Co.*

In the *Quirk* case, a track maintenance foreman had been furnished by his employer with a one-man railroad motor car for use in traveling over his work territory. He also used it, without objection by the railroad, to travel between his home in Sharpsville and his headquarters in Tipton. During the period immediately preceding his death, he was working on tracks at Muncie and there were a few

more days' work to be done there. After completing his work for the day, Quirk was given a ride in an automobile owned by a fellow employee as far as his headquarters in Tipton where he took one of the railroad's one-man motor cars intending to go to a basketball game in his home town of Sharpsville. It was during the latter part of his journey that he was killed when his railroad motor car collided with another one.

The Seventh Circuit discussed a number of decisions and then stated:

> "Applying the principles of these cases and others which could be cited, it is hardly open to question but that decedent's employment relationship ceased at the time he departed from Muncie in a privately owned automobile. When his work was completed on that day, he had the option of remaining in Muncie at the defendant's expense or making the trip to Sharpsville for the night. He chose the latter course. Certainly it cannot be thought that this action of the decedent was for the purpose of discharging any duty incident to or in connection with his employment. When he left Muncie, he was engaged solely in a personal activity unrelated to his duties as an employee of the defendant.
>
> . . . .
>
> "We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employers' Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." 189 F. 2d at 100-101.

The court also rejected an argument that because the railroad had in the past permitted Quirk to use a motor car to travel between his headquarters and his home and because the motor car was operated on the railroad's tracks, his status as an employee had been reestablished. The court considered the fact that he was using the railroad's transportation facilities for his own personal purpose and convenience to be determinative.

B. Other Conflicting Decisions

In addition to being in direct conflict with decisions by three other Courts of Appeals, the Second Circuit's decision in the case at bar is in direct conflict with:

1. *Vincent* v. *Harvey Well Service*,* a Jones Act case expressly applying FELA jurisprudence decided by the District Court for the Eastern District of Louisiana which held that an employee injured while on his way home in a car provided by his employer for that purpose was not "in the course of employment" because the employee was not under orders to use the company car and because he was not performing one of the duties of his employment at the time of the accident;

2. *Warner* v. *New York Central R. R.*,** a decision of the New York Supreme Court, Appellate Division, First Department, which held the FELA inapplicable to an injury resulting from a fall by a railroad

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*309 F. Supp. 964 (E. D. La. 1970). An appeal in the *Vincent* case is presently pending before the Court of Appeals for the Fifth Circuit.

** A. D. 2d N. Y. S. 2d (1970), 163 N. Y. L. J. No. 116, at p. 1 (June 17, 1970). A notice of appeal to the New York State Court of Appeals has been served in the *Warner* case.

employee on the stairs of his employer's passenger station while he was on his way home from work; and

3. *Symonski* v. *Central R. R. of New Jersey*,* a decision of the New Jersey Court of Errors and Appeals which held the FELA inapplicable where a railroad employee who received free transportation between home and work on his employer's passenger trains was injured on the railroad's property while on his way to work but while he was not on his work premises.**

C. The Appropriateness of Certiorari

Notwithstanding his well known antipathy for the granting of certiorari in FELA cases to review the sufficiency of the evidence for submission to the jury, Mr. Justice Frankfurter described questions involving construction of the FELA as among the most important issues presented to this Court for final determination.*** That is especially true in the case at bar where the question of when an employee is "employed by" a railroad within the meaning of Section 1 of the FELA is squarely presented. Until the Second Circuit's opinion in this case, the tests to be applied were uniformly recognized by the numerous courts which have had the question before them. The Second Circuit has discarded those tests and promulgated new ones which have no basis in precedent and are not meaningfully

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*103 N. J. L. 508, 435 Atl. 921 (N. J. Ct. of Errors and App. 1927), *affirming on opinion below*, 102 N. J. L. 271, 131 Atl. 628 (N. J. Sup. Ct. 1926).

**The Second Circuit's decision is also in conflict with the reasoning of analogous workmen's compensation cases. *See, e. g., Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327 (1922); *Kozalek* v. *New York Consolidated R. R.*, 229 N. Y. 489, 129 N. E. 888 (1920).

***Kernan v. *American Dredging Co.*, 355 U. S. 426, 441 (1958).

related to the purposes for which Congress enacted the FELA. Moreover, an element of uncertainty as to the legal principles to be applied has now been created. The question is a recurring one, as is evidenced by the pendency of the *Vincent* case and the *Warner* case, and is of considerable importance to the numerous employees covered by the FELA and the Jones Act, as well as to their employers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

July 13, 1970

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 377—September Term, 1969.

(Argued December 18, 1969 Decided February 17, 1970.)

Docket No. 33570

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Appeal by Long Island Railroad Company from judgment on verdict in the amount of $17,000 in personal injury Federal Employers' Liability Act case on trial to the jury in the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*. Affirmed.

NORMAN JAY ITZKOFF, New York, N. Y. (George M. Onken, Jamaica Station, New York, on the brief), *for appellant.*

SAMUEL BRILL, New York, N. Y. (Abraham S. Robinson, of counsel; Lewis I. Wolf and Edward R. Koudelka, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

John R. Parker, Jr., an employee of the Long Island Railroad Company, was injured in a fall on stairs at a passenger station of the railroad while on his way home from work and brought suit under the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq., in the United States District Court for the Eastern District of New York. The jury, under instructions by Chief Judge Mishler, found that the injury occurred in the course of employment, was due to defendant's negligence, that plaintiff was negligent to the exent of 15% and was damaged in the amount of $20,000 and returned a verdict for plaintiff in the amount of $17,000. From judgment on the verdict and from denial of motions to set aside and for directed verdict defendant railroad appeals. We find no error and affirm the judgment.

Parker, a track maintenance crew apprentice foreman in the employ of the Long Island Railroad Company, according to evidence which the jury could have credited, left a railroad tower of his employer, his normal place of reporting, at Hicksville, early on a summer evening after completing reports required in his employment. He walked some 2,000 feet on a public street on or along the railroad right of way to a passenger station maintained by the railroad, to take a train to his home, and was injured in a fall on a station stairway due to inadequate lighting. Parker was provided by the railroad with a pass which he was permitted to use not only to travel in connection with his track maintenance work, but also to commute to

and from his home in Brooklyn, some 40 miles from the Hicksville tower. The court held that the question of employment at the time of the injury was for the jury and that the jury might consider the free pass, that the accident was on railroad property, and the evidence as to whether the railroad was the only practical way to travel, in determining whether the travel home was related to employment.

While Chief Judge Mishler arrived at this ruling only after expressing considerable doubt, we are of the opinion that he reached the correct conclusion. In these F. E. L. A. cases and related Jones Act cases, the role of the jury is as important and determinative as in any field of tort law. See *Baker* v. *Texas & Pacific Ry.*, 359 U. S. 227 (1959); *Rogers* v. *Missouri Pacific R. R.*, 352 U. S. 500 (1957); *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957); *Gallick* v. *Baltimore & O. R. R.*, 372 U. S. 108 (1963); *Powers* v. *New York Cent. R. R.*, 251 F. 2d 813, 816 (2d Cir. 1958).

Ordinarily travel to and from work is not considered within the time of employment under this Act or under state Workmen's Compensation acts.[1] However, whether a train trip to the employee's home would be considered in the course of employment if it was unreasonable to expect him to travel by other means was left open in *Young* v. *New York, N. H. & H. R. R.*, 74 F. 2d 251, 253 (2d Cir. 1934). Here, the jury could find that the employee was an acting foreman in track maintenance, subject to call in emergencies, and lived at such a distance from the tower

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[1] *Sassaman* v. *Pennsylvania R. R.*, 144 F. 2d 950 (3 Cir. 1944); *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1 Cir. 1959); *Quirk* v. *New York, C. & St. L. R. R.*, 189 F. 2d 97 (7 Cir.), *cert. denied*, 342 U. S. 871 (1951); *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327 (1922); *Kowalek* v. *New York Consolidated R. R.*, 229 N. Y. 489, 128 N. E. 888 (1920).

where he usually was required to report that it was not economically feasible for him to continue the employment if he was not furnished the free railroad travel.

It was argued that time traveling home was not compensated for, and hence not time when Parker was employed. This is indeed a factor which may be considered, but the argument is somewhat weakened by the fact that Parker was not compensated either for the time making out the reports in the tower, which, if performed, was concededly in the course of employment.

The jury could have found that at Parker's pay rate, $128 a week, and travel to and from his home of 80 miles a day, it would be unreasonable to expect him to furnish his own transportation. This is not to say that ordinary employer-paid transportation between home and work is in the course of employment, but where, as here, the employer has an interest in availability of the man for the emergencies, the jury was not necessarily barred from finding the travel to be in the course of employment. We cannot say that a trier could not with reason conclude that the travel was so essential to the master's work as to be considered within the course of employment.

Judgment affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

Parker reported back to the railroad tower around 4:40 P.M. on the day of the accident and his hourly wages ended at that time. He somehow managed to take until 7:30 or 8 P.M. to change his clothes and fill out a few forms; there was evidence to suggest that some portion of the lengthy interval was spent in the absorption of alcohol to assuage the summer heat. Having finally decided

to go home, he sauntered some eight city blocks down Broadway and Hicksville Road to the Long Island passenger station. When he mounted the stairs to board a train, he was doing so in no different capacity from any other prospective passenger, save only that he could travel without charge. For a description of his status then it would be impossible to improve upon Judge Collin's analysis in *Matter of Kowalek* v. *New York Consolidated R.R.*, 229 N.Y. 489, 493-94 (1920), a compensation case:

> When the decedent went and was upon the station platform he was there, under the permission of the company, for the purpose of taking immediate passage on a train. The platform was open to and was occupied and used by the general public for that purpose. It was as public as the street which led to it. The decedent did not stand as an employee, even as he would not had he stepped from the office of the train dispatcher upon the street, and there stood for the purpose of taking passage upon a street car. The danger to which he was there exposed existed as to all persons who exercised the common privilege of going there for the purpose of being transported. It was neither connected with nor increased by the hazards of the actual duties of the employment. He had the right to be upon the platform and take the train for his home as a member of the public and the risks of injury in those acts were those to which every person performing them was subject. The risk to the decedent as an intending passenger, or as a passenger, was that to which he would have been equally exposed apart from his employment.

To hold that on these facts a jury might permissibly find that Parker was injured in the course of his employ-

ment puts us in direct conflict with the courts of appeals of three other circuits. *Sassaman* v. *Pennsylvania R. Co.*, 144 F. 2d 950 (3 Cir. 1944) (Jones, *J.* for the court *in banc*);[1] *Quirk* v. *New York, C. & St. L. R. R.*, 189 F. 2d 97 (7 Cir.), *cert. denied*, 342 U. S. 871 (1951); *Metropolitan Coal Co.* v. *Johnson*, 265 F. 2d 173 (1 Cir. 1959). None of the four Supreme Court cases cited by the majority bears any resemblance to this one. Neither does *Powers* v. *New York Central R. R.*, 251 F. 2d 813, 817 (2 Cir. 1958), where the employee, on leaving work, fell off a bulkhead on railroad property only a short distance from the shack where he changed his clothes. While plaintiff has cited a quantity of cases, they have been so plainly distinguished by the railroad's counsel that the majority rightly does not even mention them.

The sole factor relied upon by the majority is that Parker possessed a pass issued to "John Parker and Twenty-five Employees—Foreman Track" and used this in going back and forth to his home in Brooklyn. The language of the pass suggests it was intended for use when Parker and his crew had to ride Long Island trains to reach or return from the site of their work; if he had been injured on such an occasion, there would be no issue. There was no evidence that the Long Island authorized or knew of the use to which Parker was putting the pass. Even though the jury could find that the railroad was willing to sanction this in view of the distance of Parker's abode, that is not enough to make it rational to conclude that the transportation was in the course of Parker's employment.[2]

---

[1] The case arose prior to the amendment of 1939, 53 Stat. 1404, but the decision did not turn on the wording of the earlier version of the FELA.

[2] As I read the majority opinion, if Parker had been accompanied by a fellow worker who lived only a few miles from Hicksville and both had fallen on the stairs, the jury could permissibly find in favor of Parker but not of his companion.

The First Circuit did not think so in *Metropolitan Coal Co. v. Johnson, supra*, 265 F. 2d 173, where the plaintiff had to travel on a pass from Rhode Island to Boston to join his train.[3] As Judge Woodbury there wrote, "the obvious purpose of the FELA is to enlarge the remedy of railroad employees injured as a result of the hazards incident to their work, and the plaintiff's employment as a flagman on a freight train did not subject him to any peculiar or abnormal danger while he was riding to work on one of his employer's passenger trains. On this train he was exposed to no other or greater hazard than any other passenger." However one may feel with respect to judicial efforts to cause the FELA to afford a degree of protection regardless of fault more nearly equivalent to workmen's compensation statutes, I see no justification for stretching it to accord protection where such statutes would not. *Matter of Kowalek v. New York Consolidated R.R., supra*, 229 N.Y. 489; *Tallon v. Interborough Rapid Transit Co.*, 232 N.Y. 410 (1922); *St. Helens Colliery Co. v. Hewitson*, [1924] A.C. 59 (1923).

This does not mean that Parker had no remedy for his fall on the station stairs. Since FELA was inapplicable, he could have sued the railroad like any other prospective passenger, as Sassaman and Johnson did in their cases, subject, of course, to defenses including the important one of contributory negligence. If he had joined such a claim here, the court could have submitted it to the jury even though there was insufficient evidence to support the FELA claim, but he did not.

I would reverse the judgment with directions to dismiss the complaint.

---

[3] Judge Magruder's dissent did not go to this holding.

33570

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. JOSEPH SMITH
J. Joseph Smith

ROBERT P. ANDERSON per JJ.
Robert P. Anderson
Circuit Judges

I dissent and vote to grant rehearing.

HENRY J. FRIENDLY
Henry J. Friendly
Circuit Judge

April 14, 1970

UNITED STATES COURT OF APPEALS
Filed
APR 14 1970
A. DANIEL FUSARO, Clerk
SECOND CIRCUIT

33570

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

EDWARD LUMBARD
Edward Lumbard
Chief Judge

April 14, 1970

UNITED STATES COURT OF APPEALS
Filed
APR 14 1970
A. DANIEL FUSARO, Clerk
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of February, one thousand nine hundred and seventy.

Present: HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,

HON. ROBERT P. ANDERSON,

Circuit Judges.

JOHN R. PARKER, JR.,

Plaintiff-Appellee,

—v.—

THE LONG ISLAND RAIL ROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO

Clerk

UNITED STATES COURT OF APPEALS
Filed
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SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 384

THE LONG ISLAND RAILROAD COMPANY,
Petitioner,

v.

JOHN R. PARKER, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 384

THE LONG ISLAND RAILROAD COMPANY,

Petitioner,

v.

JOHN R. PARKER, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respondent, John R. Parker, Jr., respectfully prays that the *writ of certiorari* to review the final judgment of the Court of Appeals for the Second Circuit entered on February 18, 1970 be denied.

Question Presented.

May a jury find a railroad liable to its employee for injuries sustained on an unlighted and dark stair leading to a passenger train platform where the jury finds that such stairway reasonably had to be used as a place of egress from the plaintiff's place of work where the railroad should reasonably have foreseen that the employee would use the train to go home?

Statement of the Case.

A. The Facts.

The plaintiff, John R. Parker, Jr., was a track maintenance foreman of the defendant, L.I.R.R. (18:24-25).* He was in the railroad's employ for twenty-two years (19:2-3) and lived in Brooklyn for nineteen of those years with his family (19:5-10).

As an assistant foreman he would take charge of the gang doing, and himself would do, track maintenance and repair (19:15-21, 80:24, 82:16). When the foreman was absent, as on the day in question and several days prior thereto, he would, in addition to the aforesaid work, also be required to prepare the time and material records for the work done (22:5-23:15). He was assistant foreman for six or seven years and had last been acting foreman a year earlier (102:18-23).

Parker would report to the railroad in Hicksville, New York (19:22-24), at the office and locker room in the divide tower (19:25-20:11) which was about 2,000 feet east of the Hicksville station (20:14). He had been working out of Hicksville for about four or five years before the accident (20:15-19). After reporting to the office, a supervisor would tell the gang where to work, which could be on any branch of the L.I.R.R. east of Hicksville (21:2-6).

On the day in question, July 24, 1964, as acting foreman, after reporting to the office and going out with a crew of about 12 men by truck, he returned to the office at about 4:40 P.M. (24:5, 84:13-85:86). He then went to the locker room (24:14-16) in the divide tower, in which

---

* (Numbers in parentheses refer to pages of trial transcript where preceding colon (:); and to line number where after the colon. Suffix letter "A" refers to pages of Appendix to Petition.)

divide tower was also located the observation tower and control room and relays and electrical equipment for the running of the trains (25:1-23) in and out of the Hicksville station and between the divide tower and the Hicksville station and points east and west thereof.

The locker room had a desk and two tables, lockers for fifty to seventy-five people, and was about 30 x 30 feet in area (26:2-7). Parker made out the various reports which he was required to prepare, in that locker room (26:11-12, 26:21, 27:2, 27:3-5, 27:6-10, 27:14-15, 155:24-156:5), and with which reports he had some difficulty (28:19-29:6). After completing the work and washing up and changing his clothing (29:12-15) he went to the station building about 2,000 feet west of the divide tower to go home (29:17-25).

To get to the station from the divide tower, Parker walked on a public street—one side of the railroad track is Broadway and the other side of the track is Hicksville Road (30:10-18). At that time there were no cross streets crossing Broadway and Hicksville Road inasmuch as the railroad track and trains still ran at ground level as well as on the new overhead track. He walked directly underneath the railroad tracks crossing both streets (31:4-10, 34:5-14) which still had railroad construction going on (107).

While there was an entrance from the divide tower building on to the tracks (31:11-20), Parker was not supposed to use it (32:6).

On and prior to July 21, 1964, Parker used L.I.R.R. trains to go to and from work and had a pass (32:8-20) provided by the L.I.R.R. (33:8-9). The pass had no restrictions (114:2).

Parker was on 2-hour call for emergencies and in fact had been called on emergencies previously (33:15-21). On

the occasions when he was called, he used his pass and traveled on the railroad (33:22-25).

Parker used his pass all the time to go to and from work (34:2-4).

At the time of the accident, plaintiff earned about $135.00 per week before deductions.

At the station, Parker stubbed his toe on the middle flight of stairs leading to an upper platform as the stair was dark and he could not see the steps too well (53:8-20, 54:22-55:15, 50:17, 51:21-24, 199:22-25, 200:25-201:2, 202:3-9, 229:18-22).

The defendant's evidence indicated that some foremen did the record-keeping at night (318:24) and that the foremen were required to prepare and were responsible for preparing the records, regardless of where they were prepared (319:20-23).

Both parties concede that the L.I.R.R. did not pay the plaintiff either for preparing the reports which were required to be prepared nor for the time which the plaintiff spent in traveling between the divide tower and his home.

The Trial Court found that there was no precise formula as to the scope of employment and the Trial Court looked to cases under the New York Workmen's Compensation Law (385).

The defendant presented to the jury the issue of its negligence in having inadequately lighted steps (400, 410:2-6). Defendant argued that a person who goes to his own car to go home is not engaged in the scope of employment (427:16-21). (Cf. *Evans* v. *J.W. Mays, Inc.*, 25 A.D. 2d 597, Lv. to App. Den. 17 N.Y. 2d 423 and *GAIK* v. *National Analine*, 5 A.D. 2d 1039, Lv. to App. Den. 6 N.Y. 2d 706).

The Trial Court charged the jury on the issue of scope of employment (467:18-470:19).

According to the defendant's exception to the charge, the only test that the defendant sought to apply at the trial, was whether plaintiff was on part of railroad property which he reasonably had to use to leave his place of work (478:23-24) and whether he was required to use the train (478:6-8, 478:19-23, 481:6-12).

B. The Second Circuit's Opinion.

The opinion of the majority acknowledges that the general rule is that FELA is not applicable to injuries suffered while an employee is traveling to or from work. The opinion sets forth the great weight to be given to a jury's findings (3A) and that the issue presented in the present case was left open by the Second Circuit's case of *Young v. New York, N.H. and H.R.R.*, 74 F.2d 251, 253 (1934). The *Young* case discusses the rules concerning the duty of an employer railroad to provide a safe means of ingress and egress to an employee and that injuries occurring in such places of ingress and egress are within the scope of employment even though the employee is not physically at that time performing any work for the railroad. The Second Circuit in its opinion then goes on to discuss the facts of the present case which a jury could consider in determining whether or not the particular stair being used by the plaintiff could be found by a jury to come within the rules concerning "means of egress" (3A-4A).

REASONS FOR DENYING THE WRIT.

POINT I

THERE IS NO CONFLICT BETWEEN THE DETERMINATION BELOW AND THAT OF THE THREE OTHER COURTS OF APPEALS RELIED ON BY THE PETITIONER BECAUSE: (A) ALL COURTS RECOGNIZE THAT A RAILROAD HAS AN AFFIRMATIVE DUTY TO PROVIDE A SAFE MEANS OF EGRESS FROM EMPLOYMENT; AND (B) THE THREE OTHER COURTS OF APPEALS FOUND THAT UNDER THE FACTS AND CIRCUMSTANCES OF THEIR PARTICULAR CASES THE PLACE OF INJURY DID NOT CONSTITUTE A MEANS OF INGRESS OR EGRESS WHILE IN THE PRESENT CASE THE COURT BELOW FOUND THAT UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE AT LEAST A JURY QUESTION WAS PRESENTED.

A. All Courts relied upon by the petitioner as well as the Court below, based upon decisions of this court, find an affirmative duty on the part of a railroad to provide its employee with a safe means of egress from employment and that the employee is "employed by" a railroad with the meaning of Section 1 of the FELA while in the places of ingress or egress even though not performing one of the actual duties of employment.

The rule was succinctly set forth by this Court in the case of *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, wherein this Court said:

> "An employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express

> or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment."

The rule was more fully expounded upon by the Second Circuit in the case of *Young* v. *New York, N.H. and H.R. Co.*, 71 F.2d 251, 252, wherein the court said:

> "Although Young had finished his run . . . that did not inevitably conclude his employment, or his occupation in interstate commerce; so much at least was definitely settled in *Erie R. Co.* v. *Winfield*, 244 U.S. 170, 172, 173, and 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918 B, 662, a decision from which a good deal of law has sprouted. But it does not settle just when he does end his employment, or when he begins it, and, generally speaking, it does not include either going to or coming away from the place where the job is carried on. Voehl v. Indemnity Ins. Co., 288 U.S. 162, 169, 53 S. Ct. 380, 77 L. Ed. 676, A.L.R. 245. One exception is when the workman is in a vehicle provided for him by his employer. Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903; Atlantic Coast Line R. Co. v. Williams, 284 F. 262 (C.C.A. 5). Another, when he has not yet left the premises, or has entered them on his way to work. Lamphere v. Oregon R. & N. Co., 196 F. 336 (C.C.A. 9); Easter v. Virginian R. Co., 76 W. Va. 383, 86 S.E. 37; Davis v. Chicago, etc., R. Co., 134 Minn. 49, 158 N.W. 911; Louisville, etc., R. Co. v. Walker, 162 Ky. 209, 172 S.W. 517; Ewig v. Chicago, etc., R. Co., 167 Wis. 597, 167 N.W. 442, 169 N.W. 429; Knowles v. N. Y., N. H. & H. R. Co., 223 N.Y. 513, 119 N.E. 1023; Palloco v. Lehigh

Valley R. Co., 236 N.Y. 110, 140 N.E. 212; Wabash Ry. v. Industrial Commission, 294 Ill. 419, 128 N.E. 290. This last consideration is, however, by no means a conclusive test. His employment may begin before he reaches the premises (or even after he leaves it—words in parenthesis added). Cudahy Co. v. Parramore, 263 U.S. 418, 444 S. Ct. 153, 68 L. Ed. 366, 30 A.L.R. 532; Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S. Ct. 221, 72 L. Ed. 507, 66 A.L.R. 1402; Moss Tie Co. v. Tanner, 44 F. (2d) 928 (C.C.A. 5). Conversely, if there are alternative ways of reaching the job (or leaving it—words in parenthesis added), one across the employer's property and another elsewhere, the employer's liability will depend upon whether it is 'reasonably necessary' for the workman to use the first, or whether he does so merely for his 'convenience.' Hoyer v. Central R. Co. of N. J., 255 F. 493 (C.C.A. 2); Krysiak v. Pennsylvania R. Co., 270 F. 758 (C.C.A. 3); Aldredge v. Baltimore and O. R. R. Co., 20 F. (2d) 655, 660 (C.C.A. 8); McInerney v. Buffalo and S. R. Corporation, 255 N.Y. 130, 121 N.E. 806; Tallon v. Interborough R. T. Co., 232 N.Y. 410, 134 N.E. 327, 21 A.L.R. 1218; Ames v. N. Y. Central R. Co., 178 App. Div. 324, 165 N.Y.S. 84; Hills v. Blair, 182 Mich. 20, 148 N.W. 243; Symonski v. Central Ry. of New Jersey, 102 N.J. Law, 271, 131 A. 628; Id., 103 N.J. Law 508, 135 A. 921. Cf. Dodge v. Chicago G. W. Ry. Co., 164 Iowa, 627, 146 N.W. 14. This last corrolary does not mean, as we understand it, that to hold the employer, the workman's choice must be instrumental to the work. For example, it would be untrue, except it helped a railroad to have its workmen cross its railroad tracks rather than go two miles around. The road would, for all practical purposes, be as well served if they went the long way; and yet it would be 'unreasonable' to require

them to do so. Although only their own convenience would be met, that would be enough in so extreme a case. Concealed within the phrases used, there is the unconscious solution of a conflict of interest between the two; the workmen's convenience and the employer's freedom from responsibility. Any such solution presupposes that some value has been set on each; but there can be no general principle, for the interests are various, and there is no conventional scale in which they have a recognized place."

The aforesaid general rules were all recognized by the other three Courts of Appeals which the petitioner claims are in conflict:

The case of *Sassaman* v. *Pennsylvania* R. R., 144 F.2d 950 (C.A. 3, 1944) at pages 952-953 quotes the appropriate parts of the *Winfield* case (244 U.S. 170, 173); the *Parramore* case (263 U.S. 418, 421) and the *Bountiful Brick Co.* case (276 U.S. 154, 158).

Thus too in the case of *Metropolitan Coal Co.* v. *Johnson*, 265 F.2d 173 (C.A. 1, 1959) at page 177, the *Bountiful Brick Co.* case and the *Winfield* case as well as the *Parramore* case are cited with approval.

In the case of *Quirk* v. *New York, C. and St. L. R. Co.*, 189 F.2d 97 (C.A. 7, Cert. den. 342 U.S. 871, 1951) at page 99, the Seventh Circuit's opinion quotes at length from the aforesaid *Bountiful Brick* case.

Thus in the present case the jury in accordance with the charge given by the Trial Court, and in view of the limited exception thereto, has in fact found that based upon the facts presented to them, the stairway leading to the defendant's station which was controlled from the tower in which the plaintiff had worked constituted a means of

egress from that tower to a place where the plaintiff could reasonably be expected to go in order to leave work, namely, the defendant's train.

The Second Circuit Court of Appeals in the *Young* case, 71 F.2d 251, 253, left open the question of whether Young's passage from New Haven to Midway to get his train and from Midway to New Haven after he got through, was engaged in interstate commerce. The Court said that

> "The disproportionate hardship of requiring him to go otherwise than by train may be enough; we need not, and we do not, say."

The Court below in the present case restated the question in its opinion (3A).

We respectfully submit that in view of the facts of this case the full issue was still not decided below because the present plaintiff had not yet gotten on to the train to leave from the place which was in proximity to his place of work. Thus, the relationship between the train station and the divide tower and the construction and train tracks below the overhead line which was between the divide tower and the station were such that the stairway on which the plaintiff was injured was or could be found by the jury to have been in such close proximity to the place where the plaintiff did his actual work for the defendant as to constitute a place of egress from such work. This, of course, is one of the distinguishing factors between this case and the three cases relied upon by the petitioner which will be more specifically discussed hereafter.

Thus, the petitioner's description of the Second Circuit Court's opinion below (page 7 of petition) is inaccurate because the Second Circuit did not set forth only the two tests stated by the petitioner. The two alleged tests were set forth in a non-specific way as being two of the factors among others which the jury could consider and base a finding.

B, There is no conflict between the determination of the Court below and the three other Courts of Appeals cited by petitioner.

The determination of the court below and of the Trial Court was that the plaintiff was injured "in the employment" of the defendant railroad. This is based upon a set of facts which indicate that the stairway involved constituted a place of egress from the plaintiff's employment and that the defendant should reasonably have foreseen that the plaintiff might, under all of the facts of this particular case, be required to use said stairway.

The three other Courts of Appeals, merely determined that the places where those three plaintiffs were injured did not constitute places of ingress or egress within the meaning of the case of *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, and all of those three Courts of Appeals cited and quoted that case.

Thus, in the *Sassaman* case (144 F.2d 950, C.A. 3rd.), the plaintiff worked in Jersey City, and lived in Newark. That plaintiff was injured on a railroad platform in Newark after getting off the train in Newark where he had arrived after leaving his work in Jersey City. Thus, on the facts of that case the place where the plaintiff was injured was not "in such proximity and relation as to be in practical effort a part of the employer's premises" where the work was being performed.

In the *Metropolitan Coal* case (265 F.2d 173, C.A. 1) some mischievous boys had put a cable belonging to a co-defendant (not the railroad) across the railroad track and when the wheel of the railroad went over the cable, it snapped into a window which broke and the plaintiff was injured by broken glass as that court said "miles away from his job" (at page 178). Further, the *Metropolitan Coal* case held that the plaintiff there "was not on a part of its

premises which it was necessary or him to use to reach his work" (at page 178) unlike the present case where the Court below determined that the jury could find that the stairway was one which was necessary for him to use in order to leave the work and was in close proximity to the place where the work was actually being performed.

In the *Quirk* case (189 F.2d 97, C.A. 7), the plaintiff therein did not get onto the railroad train until going some 12 miles from the place where the work was actually performed, by private automobile owned by a co-employee. Further, in the *Quirk* case provision was made by the railroad for Quirk to stay where he was working at the railroad's expense. Further, in the *Quirk* case, there was a rule that Quirk was to remain at the place of work. Thus, that court held that once Quirk had left the town in which the work was actually being performed in a private car, he was no longer engaged in the course of employment. Thus, the place where Quirk was injured was not in close proximity to the place where the work was actually being done and Quirk had breached a rule requiring him to stay in the town where the work was being done and Quirk did not reasonably have to be at the place where he was injured in order to go to or from his work.

As heretofore indicated, all three cases which the petitioner alleges are in conflict with the determination of the court below, in the present case all rely upon, cite, and in fact quote from this court's decision in the case of *Bountiful Brick Co.* v. *Giles*, 276 U.S. 154 and *Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, wherein it was held that the place of ingress or egress need not necessarily be on the part of the employer's premises where the work was being performed, but could even be on premises owned by another which are adjacent to the work premises where it is reasonably to be expected to be used as a means of ingress or egress. Thus, the cases relied upon by the petitioner do

not involve premises on which the work was being performed nor premises adjacent thereto. In fact all three cases, as well as the other cases cited by the petitioner at pages 13-14 of the petition involved injuries sustained far from the place where the work was actually being performed and in fact was either on a train, or in a car traveling to or from work, or after getting off the train when going home from work, or before getting on the train while going to work. Thus, the Courts in those cases determined only that means of egress from or ingress to the place of employment were not involved and were too remote. How unlike the present case where the plaintiff was working in a divide tower which controlled a station 2,000 feet distant, and those 2,000 feet were part of the defendant's rail line which lay on and divided a public street which had different names on each side of the track and no cross streets, where railroad construction was going on in that street to raise the railroad from a street level line to an elevated line, where the plaintiff herein was subject to call in emergencies and lived about 40 miles away from the divide tower where he was required to report to work and was thus required to travel a distance of 80 miles per day and his take-home pay was a mere $128.00 a week and it was thus not feasible for the plaintiff to continue his employment if he were not furnished the free railroad travel, and the plaintiff in the present case had not yet boarded a train to go home.

The court below in its opinion states that in *Young* v. *New York, N. H. & H. R. R.* (74 F.2d 251, 253, C.A. 2, 1934) it had left open the question of whether a train trip to the employee's home would be considered in the course of employment if it was unreasonable to expect him to travel by other means. The three Courts of Appeals which the petitioner claims are in conflict reach only a portion of the question left open in the *Young* case: (a) While on the train going to or from work (*Metropolitan Coal Co.* v.

Johnson, supra; Quirk v. *New York, C. and St. L. R. Co., supra; Vincent* v. *Harvey Well Service*, 309 F.S. 961 (petition, p. 13); (b) After getting off the train on the way home (not while going from place of work to the train) (*Sassman* v. *Penn. R.R., supra; Warner* v. *N. Y. C. R. Co.*, A. D. 2d , N. Y. L. J., June 17, 1970, p. 1, petition p. 13); (c) While going to a train on the way to work (but not after getting off the train to the place of work) (*Symanski* v. *Central R. R. of N. J.*, 103 N. J. L. 508, 135 A. 921 affirming 102 N. J. L. 271, 131 A. 628 (petition p. 14).

Thus, all of the cases cited by the petitioner were held by the court not to involve places of ingress or egress because they were too far from the place of work within the meaning of *Bountiful Brick* v. *Giles*, and no necessity was shown. Thus, the only thing decided by the Court below was that if it was reasonable for the defendant to expect that this plaintiff would travel home by its railroad, on its unrestricted pass, then the railroad must provide a safe means for getting to that train. The Court below discusses the factors which it deems to constitute some evidence from which a jury could infer whether or not it was reasonable for the defendant to expect a plaintiff to travel by train. In view of the citation by the Court below of the *Young* case which discusses the law concerning ingress and egress as being within the scope of employment, we view the decision of the Court below as impliedly assuming that the place of the accident was a place of egress if it were found that train travel was reasonably to be expected. Petitioner, however, seems to construe the decision of the Court below to mean that all travel to and from work, if reasonably to be expected, are within FELA, but we respectfully submit that the facts in this case do not go so far, unlike the cases relied upon by the petitioner which go much further than the present case.

Under the circumstances, and in view of the limited facts in the present case which were not involved in the cases cited by the petitioner, we respectfully submit to this Court that there is no conflict between the holding of the Court below and that of any other Court of Appeals as the other Courts of Appeals have not yet ruled on the fact pattern and issues similar to that here presented by the exceptions to the charge and the facts of this case. This is especially true in view of the fact that the other Courts of Appeals had no facts before them from which a jury could find that it was unreasonable to expect the injured railroad employee to be traveling by any other means than that which he was in fact using, unlike the present case where a jury found it to be unreasonable to expect the plaintiff to travel by any means other than that by which he had yet to commence traveling.

POINT II

SOME OF THE STATEMENTS MADE IN THE PETITION MISCONSTRUE THE ACTUAL FACTS.

The petition on page 5 states that "Mr. Parker traversed approximately 8 city blocks between the tower and the Hicksville passenger station by walking on the public street known as Broadway and Hicksville Road." In the first place it is to be noted that Hicksville Road and Broadway constitute a single street down the middle of which runs the defendant's railroad track and that on one side of the track it is known as Hicksville Road and on the other side of the track it is known as Broadway. Further, there were in fact no 8 city blocks between the tower and Hicksville station because there were in fact no cross streets as the railroad track prevented any cross streets from existing between those two places, and further there was construction work going on between the tower and the station at street level so as to create a new track which

would be elevated and no longer on the city street once the construction had been completed (30:10-18).

The petitioner on page 3 goes on to state that "there was no evidence in the record to indicate that the LIRR was aware of Mr. Parker's customary method of traveling to and from work." This is clearly not the case (32:8-20, 33:8-9, 33:15-21, 33:22-25, 34:2-4). In view of the length of time which Parker had been using the pass which is in evidence, the defendant and its agents are certainly chargeable with knowledge as to the means used by Mr. Parker to travel on the railroad.

The petition at page 5 further alleges that "there was no evidence in the record to indicate that the LIRR had authorized Mr. Parker to use or were even aware that he had to use a pass for that purpose" (going to and from work). In view of the fact that the pass had no restrictions (114:2) and in view of the number of times that Parker had in fact used the pass for the purpose of going to and from work, a distance of about 40 miles in each direction, it is respectfully submitted that a jury could certainly infer that the railroad had authorized such use and had knowledge, actual or implied, of such use.

At the bottom of page 5 and the top of page 6 of the petition, it is stated that the plaintiff's "hourly wages began when he reported to the tower in the morning and ended when he reported back to the tower in the evening." As was pointed out by the Court below this argument was "weakened by the fact that Parker was not compensated either for the time making out the reports in the tower, which, if performed, was concededly in the course of employment" (4A, 319:20-23).

On page 6 of the petition it is claimed that "the cause of the fall was alleged to be a lack of light on the stairs. The LIRR did not dispute that at the time of Mr. Parker's fall the electric lights, which were turned on automatically when a photo-electric cell was activated by a lack of natural light, had not yet come on. On the other hand, Mr. Parker did not dispute that those lights did come on a short time after his fall." What the petitioner fails to advise this Court was that there was a concrete covering above the platform which covering was more than 10 feet wide (49:12-21) which would block light from coming down from the top stairway into the middle stairway; that there were no lights on the stairs (50:17) or in the immediate vicinity of the stairs (51:21-24); that the defendant's own witness Dixon testified that from the top of the first landing, he could not see each step in the middle flight of stairs (199:22-25); that even when Dixon was halfway up the second flight, he could only make out the edge of each step and not the full step (200:25-201:2); and that when Dixon arrived at the scene of the accident after its occurrence, the station lights were not yet on (202:3-9); that direct rays of the sun do not reach lower sections covered by the roof and supported by pillars (229:18-22); and that the defendant's employee Crashenfels testified that the photo-electric cell that turned the lights on and off was opposite the station building, some 15 feet away from it (275:2-10); and that absent light from above the stair, there would be little, if any, light on the stair (286:10-20).

On page 7 of the petition it is noted that no active Circuit Judge requested that a vote be taken on the railroad's suggestion that a hearing be held *en banc*. It is noted, of course, that even the dissenting Judge did not make such a request.

Lastly, it is to be noted that the New York State cases now construe the places of ingress and egress more liberally

than the older New York cases cited by the dissenting opinion. See *Gaik v. National Mahline*, 5 A.D. 2d 1039, 173 N.Y.S. 2d 409, leave to appeal denied 6 N.Y. 2d 706; *Evans v. J. W. Mays, Inc.*, 25 A.D. 2d 597, leave to appeal denied, 17 N.Y. 2d 423 where the accident occurred on a municipal parking lot; *cf. Rozelle v. Robertson*, 29 A.D. 2d 589, 590; *Fay v. DeCamp*, 257 N.Y. 407, 411.

CONCLUSION

THE DETERMINATION BY THE COURT BELOW THAT A JURY QUESTION WAS RAISED AS TO WHETHER THE STAIR INVOLVED WAS A PLACE OF EGRESS SO AS TO SUSTAIN THE DETERMINATION THAT THE PLAINTIFF WAS IN THE COURSE OF EMPLOYMENT AT THE TIME OF THE ACCIDENT IS NOT IN CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS AND THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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